



Cross-border home work: a permanent establishment?

news

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During the pandemic we were forced to work en masse from home, even employees who were normally employed abroad suddenly had to telecommute from their home countries.

During that period, certain tax and social law regulations were temporarily applied somewhat flexibly, as it was an exceptional and temporary situation, for which appropriate regulations were developed.

However, now that teleworking has become a permanent part of our work reality, it is high time to consider the current tax implications when teleworking internationally (structurally). Specifically, we examine whether or not teleworking by an employee can lead to the creation of a "permanent establishment.

It is worth noting that on November 23, 2023, Belgium and the Netherlands concluded a clarifying agreement regarding the concept of 'permanent establishment' with respect to employees working from home. Starting from a Belgian-Dutch context, the principles can be applied analogously with other countries.

Permanent establishment

The concept of a "permanent establishment" is assessed by reference to Article 5, §1 of the Double Tax Treaty between Belgium and the Netherlands. This treaty defines a permanent establishment as "a permanent place of business through which the business of an enterprise is wholly or partly carried on."

To determine whether or not employees working from home results in a permanent establishment of the employer's enterprise in the employee's country of residence, the review begins with the analysis of Article 5§1 of the Double Tax Treaty and all its interpretations, including those of the OECD Commentary.

Power of disposition

According to the OECD commentary, the primary issue for employees working from home is whether there is a "fixed place of business," which presupposes that it is at the disposal of the enterprise. In other words, the employer must have control over the home offices of the employees concerned. This will often depend on the specific circumstances.

To guide us in this, the agreement between Belgium and the Netherlands can serve as a guide for this assessment.

Clarifying agreement dated Nov. 23, 2023

The agreement already distinguishes for cases when there is (i) occasional home work; (ii) structural home work with the possibility of working on location or (iii) structural and mandatory home work.

(i) Occasional home work

The first situation where the employee only occasionally works from home is fairly straightforward. In this case, there is no permanent establishment. Here the workplace is not at the employer's disposal since the necessary continuity is lacking.

(ii) Structural home work with the possibility of working on location

In the case where an employee works from home regularly (for example, several days a week), it is important to assess whether or not this telecommuting is mandatory.

If an employee structurally works from home in his or her own country of residence, while he or she also has the option to work at the employer's workplace in the country of residence, then there is no permanent establishment. Indeed, in this situation, the employer does not expect the employee to perform his or her duties from the home office, and this office is not at the disposal of the employer's enterprise.

The clarifying agreement between Belgium and the Netherlands thus follows the OECD commentary on Article 5, §1 of the Double Tax Treaty.

(iii) Structural and mandatory home work

On the other hand, if it is clear from the factual situation that the employer requires the employee to perform his duties from his home office, then the home office may well be considered available to the employer's business. Again, it depends on the specific circumstances.

The obligation may be explicitly stipulated in the employment contract, but may also appear

implicitly when the employer does not offer an alternative workplace to the employee.

50% of working time

Finally, the agreement between the Netherlands and Belgium provides another practical guideline.

According to this agreement, in any case, there is no question of a permanent establishment when the employee concerned works 50% or less of his working time from home.

In this sense, this 50% rule is in line with the recent EU framework agreement of June 6, 2023 for cross-border telework on NSSO and Social Security.

Conclusion

In summary, the transition to mass homeworking has created new tax and social law challenges, especially in international teleworking. The question of whether telework leads to a permanent establishment is topical. Belgium and the Netherlands concluded a clarifying agreement on this issue on November 23, 2023. The principles included in this agreement, however, also apply to other countries.

The concept of "permanent establishment" is assessed under the double taxation treaty, which revolves around the employer's power of disposal over employees' home offices.

The agreement between Belgium and the Netherlands distinguishes between occasional home work, structural home work with flexibility to work on location, and structural and compulsory home work. In the latter case, the home office can be considered a permanent establishment, depending on the circumstances.

Finally, the agreement stipulates that when an employee works 50% or less of his working time from home, there is no permanent establishment, which is in line with the recent EU framework agreement of June 6, 2023 on cross-border telework and social security.



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